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THE STATEWIDE CIVIL NON-BINDING COURT-ANNEXED ARBITRATION PROGRAM - - A PRIMER

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Background

N.J.S.A. 39:6A-24 *et seq*., signed into law on October 4, 1983, mandated that all auto negligence cases valued at $15,000 or less be submitted by the Superior Court to arbitration. The statute also provided for voluntary arbitration of cases in which the value exceeds $15,000, provided no complex factual or novel legal issues are involved. The stated purpose of the statute was to establish an informal system of handling such cases in an economic and expeditious manner, and to ease the congestion of the courts.

On December 22, 1987, N.J.S.A. 2A:23A-20 *et seq.* was enacted, mandating arbitration of certain personal injury cases valued at $20,000 or less. This statute also provided for voluntary arbitration of cases valued in excess of the $20,000 threshold.

Beginning in the mid-1980's, a number of counties obtained Supreme Court authorization to operate a variety of expanded arbitration programs. Each county's program varied as to the types of cases handled and the applicable monetary thresholds. Effective September 4, 2000, civil best practices were implemented. Under best practices, arbitration was standardized across the state. As part of this effort, only certain specified case types, regardless of value, were made subject to arbitration. Now embodied in *R.* 4:21A *et seq*. of the Rules Governing the Courts of the State of New Jersey, the Statewide Civil Arbitration Program requires the submission to non-binding arbitration of the following case types pending on Tracks I, II or III[1] in the Law Division, Civil Part of Superior Court:

- all auto negligence cases, regardless of amount in controversy;
- all personal injury cases, regardless of amount in controversy, including assault and battery and products liability cases but excluding professional negligence cases;
- all Personal Injury Protection (PIP) cases;
- all book account cases and actions on a negotiable instrument; and
- all other contract and commercial cases that, after screening by the court, are deemed appropriate for arbitration.

Track IV cases[2] may be subject to arbitration within the discretion of the managing judge.

Some of the features of the court-annexed arbitration program include:

- Arbitrators adjudicate cases, thereby providing the parties with a decision on the merits and a "day in court." See *R.* 1:40-2(a)(1).
- The arbitration hearing must occur within 60 days after the close of the applicable discovery period permitted for the particular track, thereby providing an opportunity for a rapid resolution to the dispute, but only after all parties are ready to proceed [*R.* 4:21A-1(d)].
- Arbitration hearings are held in court facilities and thus have the same dignity as trials; however, they are not recorded [*R.* 4:21A-5(d)].
- The Rules of Evidence do not apply at the arbitration hearing. Arbitrators may hear any evidence necessary to render a decision. Further, in lieu of hearing testimony from witnesses, other than the parties, arbitrators may accept affidavits of witnesses, interrogatories, deposition transcripts, and bills and reports of hospitals, doctors or other experts [*R.* 4:21A-4(c)]. This more informal and flexible procedure saves both time and witness fees.
- The average length of an arbitration hearing is considerably shorter than most trials. Simpler cases, such as two-party auto negligence cases, often can be heard in less than an hour. More complex cases may take several hours to hear, but this is still significantly quicker than a trial.
- Arbitrators must be either attorneys with seven years of experience in the particular area of law or retired Superior Court judges.

- Although the rules provide that the parties to an arbitration hearing may choose the arbitrator who will hear their case by stipulating in writing to the name of the arbitrator [*R.* 4:21A-2(a)], this alternative procedure is rarely, if ever, used.
- Cases are heard by a single arbitrator who is paid $350 per day [*R.* 4:21A-2(c) and (d)].
- If any party is not satisfied with the arbitrator's award, that party can request a trial *de novo* upon demand filed and served within 30 days of the filing of the arbitration award and upon payment of $200 [*R.* 4:21A-6(b)(1), -6(c)]. A trial *de novo* must be held within 90 days of the filing of the trial *de novo* request.
- If the party demanding a trial *de novo* does not improve its position at trial by at least 20 percent, that party may be subject to monetary sanctions, up to a total of $750 in attorney's fees and $500 for witness costs [*R.* 4:21A-6(c)].
- If no trial *de novo* is requested, the case will be dismissed 50 days after the filing of the arbitration award unless either party moves for confirmation of the arbitration award by the court and entry of judgment, or submits a consent order to the court detailing the terms of settlement and providing for dismissal of the action or entry of judgment [*R.* 4:21A-6(b)].

Powers of Arbitrators

Arbitrators serving in the civil arbitration program have the following powers:

- To issue subpoenas, at the request of a party or on their own initiative, to compel the attendance of witnesses or the production of documents at the arbitration hearing [N.J.S.A. 39A:6A-4(b), N.J.S.A. 2A:23A-24 and *R.* 4:21A-4(b)].
- To administer oaths and affirmations [*R.* 4:21A-4(b)].
- To determine the law and facts in the case [*R.* 4:21A-4(b)].
- To exercise the powers of the court in the management and conduct of the hearing [*R.* 4:21A-4(b)].
- To vary the order of procedure at the arbitration hearing [*R.* 4:21A-4(b)].
- To receive any reliable, relevant evidence and determine its weight, regardless of the Rules of Evidence [*R.* 4:21A-4(c)].

Removal from Arbitration

Prior to the notice of the scheduling of the case for an arbitration hearing or within 15 days thereafter, removal from arbitration can be sought upon submission of a certification to the court stating with specificity either the reasons why the case involves unusually complex factual or novel legal issues or that the case has been mediated, remains unresolved, and the arbitration would be fruitless. If the stated reasons are not sufficient, the request to remove must be denied even if all parties consent to removal. After 15 days of the notice of arbitration hearing, removal can only be requested by formal motion.

Adjournment of Arbitration Hearings

Adjournment requests should generally be made only if a necessary attorney, party or witness is unavailable. Because arbitration is not scheduled until after the close of discovery, no adjournment request based on incomplete discovery should be made or granted barring exceptional circumstances, nor should an adjournment request be granted to accommodate a dispositive motion returnable on or after the arbitration date.

According to *R.* 4:21A-1(d), the procedure for requesting an adjournment of an arbitration hearing is the same as that for requesting a trial adjournment.

Attendance at Arbitration Hearings

Rule 4:21A-4(f) provides that an appearance by or on behalf of each party is required at the arbitration hearing. The comment to the rule makes clear that it is sufficient for either the party or the party's attorney to appear. Nevertheless, to ensure that the purpose of arbitration to provide litigants a "day in court" is not compromised, litigants should routinely be encouraged to attend and participate in arbitration hearings. Evaluations of the arbitration program have found that there is a real benefit in having people come to the courthouse, tell their stories and receive a impartial assessment of their cases from an experienced, competent arbitrator.

If the attendance of a particular party is critical to the other side's proof of his or her case, the opposing party should serve a notice in lieu of a subpoena on the party whose attendance is needed.

If neither the party claiming damages nor that party's attorney appears, the party's pleading will be dismissed. If neither a defendant nor the defendant's attorney appears, the answer will be stricken, the arbitration will proceed and the non-appearing party shall be deemed to have waived the right to request a trial *de novo*. Relief from any order entered as a result of a non-appearance shall be granted only on motion showing good cause and on such terms as the court deems appropriate, including payment of litigation expenses and counsel fees incurred as a result of the non-appearance. In this regard, see Delaware Valley Wholesale Florist, Inc v. Addalia, 349 N.J. Super. 228 (App. Div. 2002).

The Arbitration Award

After each side has completed its presentation, the arbitrator renders a decision and prepares a written award. The decision is normally made on the day of the arbitration hearing in the presence of the participants. The parties are given a copy of the decision (for which they must sign) along with a trial *de novo* request form.

Proceedings Following Arbitration Hearings

An order will be entered dismissing the action 50 days following the filing of the arbitrator's award unless, within 30 days after the filing of the arbitration award, a party files and serves on all adverse parties a notice of rejection of the award and demand for a trial *de novo*; or, within 50 days after the filing of the arbitration award, either the parties submit a consent order to the court

detailing the terms of settlement and providing for dismissal of the action or for entry of judgment or any party moves for confirmation of the award and entry of judgment thereon.

Time for Trial *De Novo* Request

A trial *de novo* request must be filed and served within 30 days after the arbitration award is filed. See N.J.S.A. 39:6A-31, N.J.S.A. 2A:23A-26 and *R.* 4:21A6(b) (1). See also Jones v. First National Supermarkets, Inc., 329 N.J. Super. 125 (App. Div. 2000), making it clear that service of the request on all adverse parties within the 30-day period is as critical as filing it with the court. See also Corcoran v. St. Peter's Medical Center, 339 N.J. Super. 337 (App. Div. 2001), holding that the substantial compliance doctrine excusing strict application of the requirements of *R.* 4:21A-6(b)(1) applies to service of a request for a trial *de novo*. See also Woods v. Shop-Rite Supermarkets, Inc., 348 N.J. Super. 613 (App. Div. 2002), holding that oral notification of an intention to file a trial *de novo* request following arbitration was insufficient and did not constitute substantial compliance with the requirement of timely service of the demand on one's opposing party.

The 30-day time period for filing a demand for a trial *de novo* may be extended upon a showing of "extraordinary circumstances." See Mazakas v. Wray, 205 N.J. Super. 367 (App. Div. 1985).

In Behm v. Ferreira, 286 N.J. Super. 566 (App. Div. 1996), the court held that the fact that counsel was too busy or had too heavy a workload to properly handle the litigation or supervise staff was insufficient to constitute "extraordinary circumstances." Similarly, an attorney's failure to review his diary and ensure that his secretary followed his instructions to timely file a trial *de novo* request was not found to constitute "extraordinary circumstances." See Hartsfield v. Fantini, 149 N.J. 611 (1997). See also Wallace v. JFK Hartwych, 149 N.J. 605 (1997), holding that an attorney's carelessness in incorrectly marking the expiration date of the 30-day period for demanding trial *de novo* was not "extraordinary circumstances." In addition, see Martinelli v. Farm-Rite, Inc., 345 N.J. Super. 306 (App. Div. 2001), holding that the failure of defense counsel to timely file a trial *de novo* request because of a problem with his office's automated diary did not constitute an "extraordinary circumstance." Similarly, a communication breakdown between a claims agent and a motorist's attorney is not sufficient grounds for granting a motorist's untimely request for trial *de novo* of an arbitrated claim. Lawrence v. Matusewski, 210 N.J. Super. 268 (Law Div. 1986).

The filing of a request for a trial *de novo* one business day late was held to constitute substantial compliance with the Rules of Court and constituted an "extraordinary circumstance" permitting the enlargement of the time within which to demand a trial *de novo*. See Gerzenyi v. Richardson, 211 N.J. Super. 213 (Law Div. 1986). Also, in De Rosa v. Donohue, 212 N.J. Super. 698 (Law Div. 1986), the court found that the particular circumstances in the case, namely that the mailed trial *de novo* notice took eight days to travel a distance of only fifteen miles, constituted sufficient reason for extending the 30-day period. The court specifically pointed out, however, that

its ruling should not be interpreted to excuse the late arrival of a trial *de novo* request mailed a few days before the filing deadline. 212 N.J. Super. at 703.

Assessment of Fees and Costs Against Unsuccessful Trial *De Novo* Requestor

No costs shall be awarded if the party demanding the trial *de novo* has obtained a verdict at least 20 percent more favorable than the award. That party may be subject to monetary sanctions up to a total of $750 in attorney's fees and $500 for witness costs [*R.* 4:21A-6(c)].

A per quod claim should be combined with the award to the injured spouse in determining a party's potential eligibility for counsel fees and costs under *R.* 4:21A-6(c)(1) following a trial *de novo*. See Coughlin v. Morell, 222 N.J. Super. 71 (App. Div. 1987).

If a plaintiff who had rejected an arbitrator's award is found to have no cause of action following a trial *de novo*, no attorney's fees or costs may be assessed against that plaintiff. This is so because under N.J.S.A. 39:6A-34 attorney's fees and costs can only be offset against any damages awarded to a party. See Ghazouly v. Benjamin, 251 N.J. Super. 1 (App. Div. 1991).

In Helstoski v. Hyckey, 255 N.J. Super. 142 (App. Div. 1988), the court provided guidance as to the circumstances necessary to justify, on the basis of hardship, the denial of costs following a trial *de novo* of an arbitrated case in which the plaintiff failed to improve its position by 20 percent, and held that the reasonableness of a party's rejection of an arbitration award is irrelevant to the determination.

Effect of 50-day Dismissals Following Arbitration

According to Accilien v. Consolidated Rail Corporation, 323 N.J. Super. 595 (App. Div. 1999), if a motion is brought to vacate a 50-day dismissal and file a late trial *de novo* request, the dismissal order is considered to be "with prejudice" and the moving party must show "extraordinary circumstances." Under Allen v. Heritage Court Associates, 325 N.J. Super. 112 (App. Div. 1999), however, if a motion is brought to vacate the dismissal, confirm the arbitration award and enter judgment, a more relaxed standard is applied. The court in Allen noted:

> "Although a motion to vacate a dismissal for failure to file a timely motion to confirm an arbitration award should be viewed with great liberality, litigants should be discouraged from adopting a cavalier attitude towards the requirement that a motion to confirm must be filed within fifty days. Therefore, some sanction should be imposed for plaintiff's failure to comply with this requirement. Accordingly, although we reverse the order denying plaintiff's motion to reinstate her complaint and remand for entry of an order confirming the arbitration award, we direct that prejudgment interest on that award shall be suspended for the period between the expiration of the fifty days allowed for a motion to confirm and the filing date of this opinion." See *R.* 4:42-11(b) (providing for suspension of prejudgment interest in "exceptional cases") (325 N.J. Super. at 121).

See also Sprowl v. Kitselman, 267 N.J. Super. 602 (App. Div. 1993), holding that the standards set forth in *R.* 4:50-1 apply to late requests to confirm an award and enter judgment filed after a 50-day dismissal.

Taxed Costs upon Confirmation

In Greenfeld v. Caesar's Atlantic City Hotel/Casino, 334 N.J. Super. 149 (Law Division 2000), the court held that the provisions of *R.* 4:42-8, concerning the allowance of taxed costs to a prevailing party, should not be applied to permit or require an award of costs following confirmation of an arbitration award and entry of judgment unless the claim for costs is specifically preserved in the award itself.

Interplay Between Arbitration and Offer of Judgment Rule

Elrac v. Britto, 341 N.J. Super. 400 (App. Div. 2001) held that the provisions of the offer of judgment rule (*R.* 4:58) apply to arbitration pursuant to *R.* 4:21A-3. Thus, when an offer of judgment is made and rejected, and it is at least as favorable as a subsequent arbitration award and no trial *de novo* was requested, the offeror is entitled to costs of suit, litigation expenses and attorney's fees incurred after the date of non-acceptance of the offer.

Conclusion

The court-annexed arbitration program has demonstrated that it is an integral part of the civil justice system. Subjective evaluations completed by users of the program have been overwhelmingly positive. Nonetheless, the Judiciary is constantly working to enhance the program's effectiveness through working collaboratively with the bar and other key participants in the arbitration process.

Footnotes

1) Pursuant to the implementation of Civil Best Practices, effective September 2000, the caseload in the Law Division, Civil Part of Superior Court is divided into tracks based upon relative complexity.
2) Cases assigned to Track IV comprise the most complex of all pending cases, and are normally managed by a single judge from filing through resolution.

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